Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
General Communication, Inc., Transferor,	))	WC Docket No. 17-114
	)	
GCI Liberty, Inc., Transferee,	))	
	)	
Applications for Consent to Transfer Control of International and Domestic Section 214 Authority	)))	

PETITION TO DENY

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Executive Summary

The proposed transaction will be detrimental to the public interest. Unless checked, GCIL will have even greater power to impose monopoly rents than GCI enjoys today. Alaska Communications has first-hand experience with GCI's exercise of monopoly power in telecommunications markets in Alaska. The public interest has been harmed by this behavior through diminished competition, fewer locations served by broadband, and extraordinary prices charged by GCI for retail and wholesale services provided over bottleneck facilities – facilities that were built in substantial measure by relying on federal funds. Approval of the pending transaction without appropriate conditions (as proposed herein) would increase the ability and incentive of GCI's operating subsidiaries to abuse their monopoly power in Alaska telecommunications markets. As such, Alaska Communications must oppose the applications.

In order to find that the proposed transaction would serve the public interest, convenience and necessity, the Commission must impose several conditions on GCIL. First, GCIL must be required to use federal Universal Service support to expand middle mile infrastructure linking remote facilities to existing networks. Second, that new infrastructure and any existing infrastructure that GCIL deployed, relying in any measure on federal funds, must be made available to all requesting carriers on commercially reasonable and non-discriminatory rates, terms and conditions. Third, GCIL must be required to enter into emergency service restoration agreements with other carriers on commercially reasonable terms.

Additional middle mile infrastructure, capable of meeting modern and future broadband requirements, is a necessity in rural Alaska. Approval of the transaction with the conditions proposed here will put competition on stronger footing and increase infrastructure investment as well as customer choice. Allowing the Applicants to move forward without these conditions would harm competition and fail to serve the public convenience or necessity.

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PETITION TO DENY

Pursuant to Section 1.939 of the Commission's rules,[1] Alaska Communications hereby petitions the Commission to deny the above-captioned applications. As proposed, this transaction threatens competition and consumer welfare in Alaska. Unless the Commission imposes appropriate and necessary conditions on the proposed transferee, as described herein, grant of these applications will disserve the public interest, convenience and necessity.

I. INTRODUCTION & LEGAL AUTHORITY

Under Section 214 of the Communications Act, the Commission may not approve a transfer of control or discontinuance of interstate or international telecommunications authority unless it finds that "neither the present nor future public convenience and necessity will be adversely affected thereby."[2] Similarly, in the case of each application for radio station permit and license, including for modification or renewal thereof, the Commission must decide whether "the public interest, convenience and necessity will be served by the granting of such

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[1] 47 C.F.R. §1.939.
[2] 47 U.S.C. §214(a).

application."[3] Any party in interest may file a petition with the Commission to deny any such application, provided such petition contains specific allegations of fact sufficient to show that the petitioner is a "party in interest" and that grant of the application would be inconsistent with the public interest, convenience and necessity.[4] Further, no aeronautical, broadcast or common carrier radio station permit or license shall be transferred, assigned or disposed of in any manner, including by transfer of control of the corporation holding such permit or license, except upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.[5]

The Commission characterizes its public interest analysis of merger transactions such as this as necessarily encompassing "the broad aims of the Communications Act,"[6] including "a deeply rooted preference for preserving and enhancing competition in relevant markets," as well as "accelerating private sector deployment of advanced services."[7] This analysis also entails consideration of whether the transaction would result in any decline or improvement in the availability and quality of services to consumers.[8]

In similar transactions, the Commission has evaluated whether the combined companies (or the surviving entity) will have the legal, technical, financial and character capabilities to be

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[3] 47 U.S.C. §309(a).
[4] 47 U.S.C. §309(d). *See also* Application of AT&T Mobility Spectrum LLC and CenturyTel Broadband Wireless, LLC For Consent to Assign a Lower 700 MHz Band and AWS-1 Licenses, 27 FCC Rcd 15826 (Wireless Tel. Bur. 2012) (to establish "party in interest" standing, petitioner must "allege facts sufficient to demonstrate that grant of the subject application would cause it to suffer a direct injury" and "demonstrate a causal link between the claimed injury and the challenged action").
[5] 47 U.S.C. §310(d).
[6] *Charter Comm's, Inc. et al.,* 31 FCC Rcd 6327, 6337 (2016) ("*Charter Comm's*"), citing *Western Union Div., Commercial Telegrapher's Union, A.F. of L. v. United States*, 87 F. Supp. 324, 355 (D.D.C 1949), *aff'd*, 338 U.S. 864 (1949).
[7] *Charter Comm's,* 31 FCC Rcd at 6337.
[8] *Id.,* 31 FCC Rcd at 6337.

an FCC licensee.[9] In addition, the Commission has evaluated whether the proposed combination poses any significant risk of harm to competition.[10] Where the Commission finds significant risk of harm to the public interest, it must then find that the expected benefits to the public arising from the transaction would clearly ("by a preponderance of the evidence") outweigh the likely public interest harms.[11] The Commission has broad authority under the Communications Act to impose and enforce conditions to ensure that, should the transaction close, the public interest will be served.[12]

General Communication, Inc. ("GCI") and Liberty Interactive Corporation ("LIC") request approval of a merger through which GCI Liberty, Inc. ("GCIL") will be formed and will assume control of GCI's operating subsidiaries and communications assets, together with "certain businesses and assets attributed to the Liberty Ventures Group of LIC" though the applications fail to specify what those businesses and assets might be.[13] The combined operations of GCIL will be ultimately owned by the public shareholders of LIC (84 percent of the voting interest and 77 percent of the total equity) and GCI (16 percent of the voting interest

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[9] *See, e.g.*, *Charter Comm's,* 31 FCC Rcd at 6339.
[10] *See, e.g.*, *id.,* 31 FCC Rcd at 6338, citing *Applications of AT&T and DIRECTV,* 30 FCC Rcd 9131 (2015) ("*AT&T- DIRECTV*").
[11] *See, e.g.*, *AT&T- DIRECTV,* 30 FCC Rcd at 9140 ("If the transaction does not violate a statute or rule, we consider whether the transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes. We then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits. The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest. If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we must designate the Application for hearing") (citations omitted).
[12] *Charter Comm's,* 31 FCC Rcd at 6338.
[13] Applications at 1. Applicants assert that the LIC entities that will be incorporated into GCIL "offer no FCC-regulated services at all." *Id.,* Exhibit, Public Interest Statement at 12.

and 23 percent of the total equity).[14] The current President and Chief Executive Officer ("CEO") of GCI will become a board member of GCIL.[15] The applicants do not disclose who will be the new CEO of GCIL, but they assert that GCI's leadership team will not change as a result of the proposed transaction.[16] The applicants state that the respective voice, cable television, Internet communications, and wireless voice and broadband operations of GCI and LIC have no geographic overlap.[17]

The applicants offer one "public interest benefit" potentially arising from the proposed transaction: GCIL will have improved access to financial markets and, therefore, "greater capacity to execute on GCI's current business plan."[18] This, they say, will "promote stability and investment in Alaska, to the benefit of consumers in the many communities that GCI serves."[19]

The very justification offered for the proposed transaction, "greater capacity to execute on GCI's current business plan," poses a substantial threat to competition and consumers in Alaska, as explained below. GCI acts in all material respects as if it operates an unregulated but federally subsidized monopoly today, and permitting it to merge with LIC will make it even more capable of anti-competitive behavior.[20] Therefore, the Commission cannot find that the public interest, convenience and necessity will be served by approving this transaction unless it

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[14] Public Interest Statement at 7.
[15] Applications at 5.
[16] Public Interest Statement at 7.
[17] *Id*. at 12 ("there is no geographic overlap between the markets that these businesses serve").
[18] Applications at 2. *See also* Public Interest Statement at 11 ("Thus, [the merger] will further improve GCI's ability to execute its plans to expand the geographic reach of its wireless, wireline, and high-speed Internet services in Alaska, helping to bridge the digital divide in some of the most isolated areas of the United States").
[19] Public Interest Statement at 9.
[20] *See* Declaration of David C. Blessing, attached hereto as Exhibit A, ¶3 and *passim*.

crafts appropriate conditions to restrain monopolistic behavior by GCIL and provide necessary protections to consumers and competition.

II. Alaska Communications Is a Party in Interest

Alaska Communications directly competes with GCI in a wide range of services throughout Alaska. These services include local exchange and exchange access services, interexchange telecommunications, information services, broadband Internet access services ("BIAS"), and broadband data services ("BDS"), including both wholesale and retail broadband transmission services. For the most part, both companies operate as facilities-based competitors in each other's local markets, in the interexchange market and in the broadband market, although each resells the services of the other to some extent.[21] Both Alaska Communications and GCI operate undersea fiber optic cables linking Alaska to the contiguous United States (where the nearest Internet access points are located). Both companies claim to be the premier provider of telecommunications services in Alaska; to be specific, GCI dominates the local exchange market and has the largest fiber network in the state.[22] GCI combines its telephone and data telecommunications capabilities with wireless and cable television offerings to provide service bundles that Alaska Communications cannot always match.[23] GCI is larger than Alaska Communications in terms of customer base, number of employees, assets, market capitalization, revenues, EBITDA, and access to capital.[24] By virtually any standard, GCI dominates every Alaska market in which it has a presence.

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[21] Declaration of Mark Enzenberger, attached hereto as Exhibit B, ¶ 6.
[22] Declaration of Beth R. Barnes, attached hereto as Exhibit C, ¶3.
[23] *Id.*
[24] GCI states that it is "the largest Alaska-based communications provider as measured by revenues," with $933.8 million in revenues for 2016. GCI 2016 Annual Report at 4, available at: http://ir.gci.com/phoenix.zhtml?c=95412&p=irol-sec. *See also* Comments of Alaska

Though the two companies are competitors, Alaska Communications heavily relies on GCI for long-haul transport or "middle mile" telecommunications between Alaska Communications' facilities in Anchorage, Fairbanks and Juneau, on the one end, and many of its customers in rural and remote communities, such as in southwest and southeast Alaska, on the other. GCI possess the *only* fiber-based terrestrial and submarine middle-mile facilities linking many rural and remote locations to other telecommunications infrastructure, so Alaska Communications is by necessity a wholesale customer of GCI in order to provide interexchange voice and long-haul data services to such customers.[25] Because GCI has been effectively unregulated on those routes, GCI enjoys market power – indeed a monopoly – for those services, and has used its control of bottleneck facilities to block effective competition and maintain above-market rates.[26] In some locations, Alaska Communications has been priced out of the market, unable to offer broadband service to its own local exchange customers, due to excessively high middle-mile transport prices charged by GCI over facilities funded directly or indirectly by the federal government.[27]

Communications, WC Docket Nos. 16-143 *et al*., pp. 16-17 (filed June 28, 2016) (comparing GCI's dominance over Alaska Communications in number of employees, revenues, EBITDA, market capitalization and other metrics).

[25] Although satellite transport is possible in some cases, it is inadequate for many broadband applications. *See infra*, note 33 & accompanying text.

[26] *See, e.g.,* Letter from Karen Brinkmann, Counsel to Alaska Communications, to Marlene H. Dortch, FCC Secretary, in WC Docket 16-143 *et al*. (filed Sept. 2, 2016), Supplemental Declaration of David C. Blessing at 10-12; Reply Comments of Windstream, WC Docket 05-25 (filed Aug. 9, 2016), Declaration of Robert D. Willig at ¶42 (in the absence of regulation, an entity that controls bottleneck facilities has the ability and the incentive to set wholesale rates at artificially high levels to raise rivals' costs).

[27] *E.g.,* Letter from Karen Brinkmann, Counsel to Alaska Communications, to Marlene H. Dortch, FCC Secretary, in WC Dockets 16-143 *et al*. (filed April 13, 2017) at 8-9 (describing GCI's rising prices on long-haul transport between Anchorage and Sitka, even while retail rates were falling, preventing Alaska Communications from enhancing its broadband offerings in the affected area); Letter from Karen Brinkmann, Counsel to Alaska Communications, to Marlene H. Dortch, FCC Secretary, in WC Dockets 10-90 *et al*. (filed April 18, 2016) at 8 (describing

The applicants state that GCIL will have even greater access to capital and increased purchasing power as a result of the merger.[28] Alaska Communications believes that GCIL also will have greater incentives and ability to exercise market power to deprive wholesale customers (who are competitors) as well as retail customers of affordable access to GCIL network facilities and services. For these reasons, Alaska Communications is a party in interest within the meaning of the Commission's rules and precedent, and Alaska Communications opposes FCC approval of these applications absent the conditions discussed below.

III. <u>THE PUBLIC INTEREST, CONVENIENCE & NECESSITY REQUIRE THAT THE FCC IMPOSE CONDITIONS ON GCI-LIBERTY</u>

In order to find that "neither the present nor future public convenience and necessity will be adversely affected" by the transaction, the Commission must take steps to rein in GCI's anti-competitive behavior. Even before entering into this transaction, GCI engages in monopolistic behavior in the Alaska telecommunications market, raising prices and restricting output, to the detriment of competitors and consumers. Permitting the proposed merger would enable GCIL to engage in even greater abuses of power. Below, Alaska Communications documents some of the ways in which GCI has exercised this market power in recent years. Alaska Communications then proposes three reasonable, specific and enforceable conditions that would mitigate those harms should the GCIL transaction be allowed to go forward.

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wholesale pricing of services on GCI's Terra-SW network as being five to 20 times above a reasonable cost-based rate); Letter from Karen Brinkmann, Counsel to Alaska Communications, to Marlene H. Dortch, FCC Secretary, in WC Dockets 10-90 *et al.* (filed March 11, 2016) at 3 (describing how GCI's charges for wholesale capacity on its Terra network have priced Alaska Communications out of the broadband market in southwest Alaska).

[28] Applications at 2. *See also* GCI Investor Relations News Release (dated April 4, 2017), p. 2 (benefits to GCI shareholders include "increased scale to execute on strategy" and "increased liquidity with access to resources of larger company").

A. GCI's Market Power Harms Competition in the Alaska Telecommunications Market

As the Commission has recognized, Alaska is characterized by extremes of geography, demographics, climate and topography, that make deployment, maintenance and upgrading of communications networks more costly and more time-consuming than in other states.[29]

Unlike other states, Alaska never was served by a single large provider such as a Bell operating company; rather, local exchange companies developed organically in population centers as small as a dozen homes and as large as the municipalities of Anchorage and Juneau, with transport among the exchanges provided exclusively by a small number of interexchange carriers.[30] Initially, long-haul interexchange transport (or middle-mile telecommunications) was available exclusively via satellite, and later via terrestrial point-to-point microwave, which improved on latency but still suffers from bandwidth constraints and service quality problems. Only relatively recently has fiber been available to connect some – but not all – of the 291 communities in Alaska. Of these, 188 are Bush communities, not connected by the state's road system or power grid – and in many cases, not reached by fiber or any high-speed network.

Outside of Alaska's largest population centers, great portions of the state still suffer from a unique lack of basic infrastructure (electricity, roads, telecommunications, hospitals, and other basic services). Not only Bush locations but also other rural parts of the state have limited access to modern telecommunications infrastructure. Yet communities persist in such areas, pursuing economic opportunities such as energy and fishing, continuing traditional ways of life, and

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[29] *E.g., Connect America Fund,* Order, 31 FCC Rcd 12086, ¶24 (2016) ("*ACS CAF II Order*"); *Connect America Fund,* Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 10139, ¶5 (2016) ("*Alaska Plan Order")*; *Connect America Fund,* Order, Report and Order, 29 FCC Rcd 4019, ¶151 (2014); *USF/ICC Transformation Order*, 26 FCC Rcd 17663, ¶507 (2011), *aff'd sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) ("*Transformation Order*").

[30] *See, e.g.,* Reply Comments of GCI in WC Docket 16-143 *et al.* at 2.

welcoming tourists. These rural and remote communities must have access to robust telecommunications services if they are to survive.[31]

Historically, Alaska had no single large telecommunications service provider such as a Bell Operating Company to deploy infrastructure among its communities. In the 1960s, satellite service provided the only connection between isolated Bush communities and the larger world. Terrestrial point-to-point microwave gradually has made inroads in rural and Bush Alaska, but still reaches only a fraction of the communities; in many cases, available facilities already are capacity-constrained.[32] Neither satellite nor the existing microwave infrastructure is adequate for today's broadband demands, let alone projected requirements. Latency, insufficient bandwidth and high costs mean these technologies are outdated in today's environment.[33]

Today, GCI owns more fiber transport facilities than any other entity in the state.[34] Directly, through a variety of generous federal grants and loans, and indirectly, through

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[31] *E.g.,* Letter from Nancy Merriman, Alaska Primary Care Ass'n, to FCC Chairman Pai *et al*., WC Docket No. 02-60, GN Docket No. 16-46 (filed May 24, 2017); Letter from Jaylene Peterson-Nyren, Kenaitze Indian Tribe, to FCC Chairman Pai *et al*., WC Docket No. 02-60, GN Docket No. 16-46 (filed May 24, 2017); Letter from Katherine Gottlieb, Southcentral Found., to FCC Chairman Pai *et al*., WC Docket No. 02-60, GN Docket No. 16-46 (filed May 23, 2017). Letter from Victor Joseph, Tanana Chiefs Conference, to FCC Chairman Pai *et al*., WC Docket No. 02-60, GN Docket No. 16-46 (filed May 19, 2017); Letter from LaTesia Guinn, Bethel Family Clinic, to FCC Chairman Pai *et al*., WC Docket No. 02-60, GN Docket No. 16-46 (filed May 1, 2017); Letter from Albert Wall, Peninsula Community Health Services of Alaska, to Senator Murkowski, Senator Sullivan & Congressman Young (dated Nov. 8, 2016, filed Jan. 9, 2017 in CC Docket No. 02-60); Letter from Bess Clark, Community Connections, to Senator Murkowski, Senator Sullivan & Congressman Young (dated Nov. 29, 2016, filed Jan. 9, 2017 in CC Docket No. 02-6).

[32] Enzenberger Declaration ¶9.

[33] *See* Enzenberger Declaration, ¶¶3, 9. *See also* Letter from Angela Vanderpool, Chugachmiut, to the Hon. Sen. Murkowski *et al.* (dated June 2, 2016, filed June 7, 2016 in WC Docket No. 10-90) (existing satellite and terrestrial microwave middle-mile facilities provide inadequate speed and quality, at too great a price, for Bush community health care clinics).

[34] Enzenberger Declaration, ¶4.

substantial control of the market for E-Rate and Rural Health Care services and subsidies,[35] GCI controls broadband-capable middle-mile facilities in many locations on many routes connecting rural Alaska and the Bush. This includes GCI's much-touted "Terra" project that links many Bush communities in western Alaska, including some served by an Alaska Communications ILEC, providing long-haul "middle mile" connections comprised of terrestrial microwave and fiber that enables such broadband applications as high-speed Internet access.[36] GCI is in the process of expanding Terra to certain Bush communities in northwest Alaska. Again, federal subsidy funds appear to play a key role in GCI's infrastructure expansion plans.[37] In addition, GCI has the only fiber into communities in other parts Alaska such as Kodiak Island (south of Anchorage), and Sitka and Ketchikan (in southeast Alaska).[38]

Alaska Communications serves four remote communities on the fiber portion of the Terra facility.[39] Alaska Communications knows that the incremental cost of bandwidth on an installed fiber facility is quite modest, yet GCI charges \$3,000 to \$9,000 per Mbps on a three-year contract for 100 Mb of wholesale bandwidth into these communities[40] – as much as 300 times the cost of equivalent bandwidth in Anchorage.[41] Moreover, even on the microwave

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[35] These include \$88 million in loans and grants from the Broadband Infrastructure Program (U.S. Department of Agriculture) for GCI's "Terra-SW" project, as well as hundreds of millions of dollars from USAC over the years, through a combination of federal high-cost support, rural health care ("RHC") support, and support for schools and libraries ("E-Rate support"). Blessing Declaration ¶ 5.
[36] Enzenberger Declaration ¶5.
[37] *E.g.,* Blessing Declaration, ¶¶12-13 (showing that GCI receives 59 percent of total support to Alaska and a whopping 73 percent of total RHC support to Alaska in 2016).
[38] Enzenberger Declaration ¶ 9.
[39] These communities are Kokhanok, Nondalton, Pedro Bay and Port Alsworth.
[40] Price range based on one-year contract through 25-year contract for 1 to 100 Mbps. Prices effective 7/1/2017. *See* GCI Terra Product Description and Pricing at https://www.gci.com/-/media/files/gci/regulatory/gci_terra_posting_effective_070117.pdf
[41] Blessing Declaration ¶17.

portion of Terra, where GCI's affiliate is the incumbent local exchange carrier ("ILEC"), retail broadband internet service retails for $32.50 per month per MB, clearly a lower retail rate than GCI is willing to provide wholesale.[42] GCI's wholesale pricing practices on these bottleneck routes create a price squeeze and stifle competition.[43]

In spite of the quasi-public character of those federally-subsidized facilities (and GCI's obligations as an eligible telecommunications carrier), GCI has failed to provide other service providers wholesale access to these facilities on reasonable and non-discriminatory rates, terms and conditions.[44] At times, GCI has claimed lack of sufficient capacity for any provider other than its own affiliates, and when it was willing to offer capacity, it over-charged competitors.[45]

GCI's states that Terra is an interstate, middle-mile terrestrial broadband network connecting Anchorage with more than 70 communities in southwest and northwest Alaska.[46] The services linking these communities appear to be inter-exchange telecommunications transport services, yet they are not offered on reasonable non-discriminatory terms. Alaska Communications has done extensive work to understand the basis for GCI's pricing on Terra, and has found GCI's pricing to be as much as 300 times the urban rate, whereas costs indicate that pricing should be no more than 20 times the urban rate.[47] As evidence of GCI's over-

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[42] *Id.*
[43] Blessing Declaration ¶¶17-18. *See also* Letter from Karen Brinkmann, Counsel to Alaska Communications, to Marlene H. Dortch, FCC Secretary, in WC Docket Nos. 10-90 *et al*. (filed May 24, 2016) (documenting GCI's above-cost pricing on Terra).
[44] Blessing Declaration ¶9. *See also* note 50, *infra*.
[45] Blessing Declaration ¶¶4-5.
[46] GCI web site, available at: http://terra.gci.com/home. That page makes no mention of the entity that applied for and received extensive funding for Terra, GCI's affiliated ILEC, United Utilities Inc. ("UUI"). *See generally* Blessing Declaration ¶4.
[47] Blessing Declaration ¶7.

pricing on monopoly routes, where competitive alternatives are being deployed, GCI prices are falling, not based on any change in GCI's costs, but purely based on market pressure.[48]

Competition has been unable to take hold in most areas served by Terra, notwithstanding the fact that GCI relied on federal subsidy dollars to deploy terrestrial middle-mile facilities on an unregulated monopoly basis. Consumers have failed to benefit from lower prices and service innovations that normally are associated with retail competition.[49] Carriers such as Alaska Communications have been unable to deploy broadband to their own local customers because GCI extracts monopoly profits from carriers seeking to utilize the only middle-mile infrastructure that might arguably be suitable for broadband.[50] In short, the U.S. government failed to get what it paid for when it subsidized GCI's middle-mile projects to date.

The problem of middle-mile connectivity to rural Alaska and the Bush is widely acknowledged.[51] In recent months, the FCC has received more than a dozen letters from consumer groups serving rural and remote communities, such as rural health care providers,

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[48] Enzenberger Declaration ¶10 (observing price reduction of 75 percent upon competitive entry in Deadhorse).

[49] *See, e.g.,* Letter from Ralph Andersen, Bristol Bay Native Ass'n, to the Hon. Senator Murkowski *et al*. (dated June 2, 2016, filed June 20, 2016 in WC Docket No. 10-90) (broadband capacity provided over the only available network – GCI's Terra – is over-priced and of insufficient capacity, with usage caps, rending it unsuitable for many applications).

[50] For some years Alaska ILECs have complained about lack of access to Terra. *E.g.,* Comments of the Alaska Rural Coalition, WC Docket No. 10-90, at 8-9 (filed Feb. 19, 2013); *Petition Filed by ALASCOM, INC. d/b/a/ AT&T ALASKA to be Relieved of its Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska*, Docket No. U-12-127, before the Regulatory Commission of Alaska, Comments of ACS, at 5-6 (filed Oct. 19, 2012).

[51] In 2010, more than 150 rural and Bush communities in Alaska were dependent on satellite communications. *See* Heather E. Hudson, *Connecting Alaskans* (Univ. of Alaska Press 2015), at 240. *See also* Anchorage Daily News, March 19, 2017, "Telecoms Plan Big Expansion of Broadband In Rural Alaska, With Federal Help" (citing statement of then-commissioner Pai who criticized the FCC for leaving 47,000 Alaskans without effective access to broadband due to the middle mile gap), available at: https://www.adn.com/business-economy/2017/03/19/with-federal-help-alaska-telecoms-plan-big-expansion-of-rural-broadband/.

community organizers, and Alaska native associations, urging the Commission to address this infrastructure gap.[52] Many parties have documented the inadequacy of existing facilities serving rural Alaska and the Bush,[53] as well as the need for *competition,* both as a check on prices and to bring additional service choices to rural and Bush Alaskan communities.[54]

Nor is this problem limited to the state's interior Bush communities – it extends to other rural parts of Alaska that are exclusively served by GCI-owned fiber today. For example, GCI owns fiber facilities serving Kodiak island, and Ketchikan, Sitka other communities in southeast Alaska, that are currently the only network facilities with available capacity (other, microwave-based services are capacity-constrained and unavailable for new broadband offerings).[55] When GCI's bottleneck transport in and out of those difficult-to-reach locations comes up against new competitive alternatives, prices plummet.[56]

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[52] *See, e.g.,* letters cited *supra*, note 31.

[53] These parties include other ILECs serving rural and Bush Alaska. *E.g.,* Letter from Karen Brinkmann, counsel to Alaska Communications, to Marlene H. Dortch, FCC Secretary, in WC Docket Nos. 10-90 & 05-337 (filed Dec. 15, 2015) note 3 (citing Bristol Bay Telephone Coop and other rural ILECs' statements to the Commission that they have inadequate access to affordable middle-mile broadband capability to deliver broadband to their customers, even with additional CAF Phase II support).

[54] *E.g.,* Letter from Susan Edwards, Lake and Peninsula Borough, King Salmon, Alaska, to Marlene H. Dortch, FCC Secretary, WC Docket No. 10-90 (filed Jan. 3, 2017) (supporting funding for additional middle-mile facilities, and pro-competitive policies to promote lower prices and better service to rural Alaskans); Letter from Ralph Andersen, Bristol Bay Native Ass'n, to the Hon. Sen. Murkowski *et al.,* (filed June 20, 2016 in WC Docket No. 10-90) (supporting additional facilities linking Alaska's off-road communities to urban Alaska); Letter from Bess Clark, Community Connections, to Senator Murkowski, Senator Sullivan & Congressman Young (dated Nov. 29, 2016, filed Jan. 9, 2017 in CC Docket No. 02-6) (supporting additional RHC support for affordable broadband in Alaska's rural and Bush communities).

[55] Enzenberger Declaration ¶9.

[56] *Id.* ¶10.

The Commission, too, has acknowledged the dearth of middle-mile capacity in Alaska and the extraordinary cost of bridging that gap.[57] When it approved a Connect America Fund ("CAF") plan for Alaska's rate-of-return ILECs and commercial mobile radio service ("CMRS") carriers, two commissioners felt compelled to point out in separate statements that the FCC had wasted a valuable opportunity to change the direction of history in Alaska by targeting some CAF support for Alaska middle-mile broadband infrastructure.[58]

There can be no question that GCI, through its size and scale, and its creative use of public funds, has grown to dominate the Alaska telecommunications market.[59] To date, this market power has gone unchecked, to the detriment of competition in Alaska. Allowing GCI to grow even larger, without appropriate conditions, will further hamper competitive forces in the state.

B. GCI's Market Power Has Detrimentally Affected USAC Programs and Broadband Deployment in Alaska

Competitors are not the only parties directly affected by GCI's monopolistic behavior. Of all the Universal Service Administrative Company ("USAC") payments under the Rural

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[57] In the CAF Phase II proceeding, this is one of the principal justifications for offering Alaska Communications the option of keeping frozen support as an alternative to support determined by the Commission's Connect America cost model ("CAM"). ACS CAF II Order ¶9.

[58] *Connect America Fund, et al.*, 31 FCC Rcd 3087 (2016), Dissenting Statement of Commissioner Ajit Pai ("We had a once-in-a-generation opportunity to solve Alaska's middle-mile problem. Rather than address the real flaws in the Alaska Plan, the FCC has told tens of thousands of rural Alaskans to wait another ten years for another shot at digital opportunities"); Dissenting Statement of Commissioner Mignon Clyburn (objecting to the lack of a requirement for companies to build out middle mile).

[59] Even GCI has acknowledged its unique ability to leverage economies of scale into markets other carriers have not been able to serve. *See* Comments of GCI in WC Docket No. 10-90 (filed Apr. 18, 2011) at 18 ("GCI is able to leverage economies of scale – both financially and in terms of physical infrastructure and connection to 'urban' networks – that are critical to overcoming the unique challenges that rural Alaska presents").

Health Care ("RHC") program in 2016, roughly one-third were dedicated to projects in Alaska, and although services were provided by several different eligible telecommunications carriers ("ETCs") in the state, GCI claimed the lion's share of the support – nearly 80 percent.[60] This means that GCI, though it serves only Alaska, received over 26 percent of the total RHC support dollars dispensed nationwide in 2016.

One way in which GCI has abused the RHC program is through above-market pricing of capacity on its unregulated middle-mile monopoly. As Alaska Communications has documented in other proceedings, GCI acknowledges charging prices that exceed satellite rates on the middle-mile portion of its broadband telecommunications services to RHC facilities – effectively leveraging its monopoly position to profit from the federal RHC and other subsidy programs.[61] GCI admits that it cannot lower the price it offers to wholesale customers (including the Alaska Communications LECs and other ILECs in the region reached by Terra facilities) because then it would be compelled to lower the price on RHC contracts[62] – something GCI apparently has no incentive to do in today's environment. As far as Alaska Communications is aware, USAC continues to approve support for GCI's terrestrial middle-mile capacity, even though satellite capacity in areas where there is no competition today costs a fraction of GCI's terrestrial price.

GCI has demonstrated its market power, and its willingness to use that power to throttle competition even in rural parts of Alaska not traditionally considered the Bush. In Sitka, Alaska, for example, where GCI has the only terrestrial facility (fiber) with excess capacity, GCI has quoted a higher price than provided for in current contracts for the same level of service.[63] The

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[60] Blessing Declaration ¶13 & Table 1.
[61] *E.g.*, Reply Comments of GCI, WC Docket o. 13-184 (filed Nov. 8, 2013); Comments of the Alaska Rural Coalition, WC Docket No. 13-184 (filed Sept. 16, 2013).
[62] *See id.*
[63] Enzenberger Declaration ¶9.

ability to increase prices in a market is a well-recognized attribute of market power, and GCI's has demonstrated its willingness to use this power to constrain competition. The net result is higher prices and less broadband deployment than would occur otherwise. For these reasons, it would not be in the public interest to approve the proposed transaction, enhancing GCI's power, without adequate safeguards.

C. Grant of the Proposed Transaction Without Conditions Will Harm the Public Interest

Allowing GCI to complete a merger the sole purpose of which is to enhance GCI's access to capital will only increase GCI's capacity for the type of monopolistic behavior described above. According to the applications, GCIL will have more assets than GCI, have deeper pockets, and be protected against short-term economic changes in the Alaska market.[64] In fact, GCIL will have nearly quadruple the assets of GCI. According to the *pro forma* financial statement submitted by the Applicants to the RCA, Liberty Ventures will contribute $632 million in assets to the combined company, adding to GCI's assets of $265 million. When combined with a *pro-forma* adjustment of $171 million, the adjusted total current assets of GCI Liberty will be a staggering $1.068 billion.[65]

In a company that lacks market power, an increase in size and financial prowess might benefit competition and consumers. However, that is not the case for GCI, which already is far larger than any other ILEC or video service provider in the market, and dominant in the middle mile and broadband markets as well. GCIL thus will have an even greater ability and incentive

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[64] Applications, Exhibit, Public Interest Statement at 10 (the proposed merger will "provid[e] GCI's operating businesses with more stable access to financial markets" and "reduce the exposure of those businesses to Alaska-specific market fluctuations" and "increase substantially the economic and geographic diversity of the businesses" in GCIL).

[65] Application of GCI MergerSub, Inc. and General Communication, Inc. before the Reg. Comm'n of Alaska, Docket U-17-033, Exhibit H, p. 2 (filed July 29, 2017).

than GCI to raise prices, discriminate against competitors, reduce output, and refuse service – because it will reap the benefits in the long term. For good reason the Commission has held that a company growing larger through merger or acquisition can be cause for concern in itself, even in the absence of geographic overlap or vertical integration, because the larger entity will have increased ability and incentive to discriminate.[66]

The applicants say that the enhanced financial status of GCIL will enable the company "to execute on GCI's current business plan"[67] – without explicitly defining what that is. The Commission may surmise, based on GCI's historic practices, that such a plan includes continuing to charge above-market prices, raking in the lion's share of RHC and other federal support monies, and foreclosing competitive access to its monopoly infrastructure. What GCI and GCIL characterize as promoting "stability" in Alaska[68] is seen by end-users and competitors as reinforcing the fortress that is GCI's already-dominant position in the state's broadband and telecommunications markets. GCI does not hide its ambitions to continue expanding the reach of its networks. On the contrary, the applications admit that greater access to capital is needed to maximize efficient expansion of GCI's (in some cases dominant) "wireless, wireline, and high-speed Internet services in Alaska."[69] Again, Alaska Communications would have no complaint concerning such plans if they were announced by a company that competes on level footing with other service providers. But GCI has used the regulatory system to supreme advantage -- maintaining its own unregulated status while reaping maximum profit from regulations designed

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[66] *E.g.*, *SBC-Ameritech Merger*, 14 FCC Rcd 14712, 14950 (1999) (merged entity may have an increased incentive to engage in anticompetitive behavior by allowing it to capture or internalize a higher proportion of the effects of such anticompetitive strategies).
[67] Applications, Exhibit, Public Interest Statement at 10.
[68] *Id* at 9.
[69] *Id.* at 10-11.

for the days before competition – to increase profits, minimize competition to its own services, and raise its rivals' costs. In this environment, approving the merger as proposed will adversely affect the present and future public interest, convenience and necessity.

D. Certain Specific Conditions Must Be Imposed On the Applicants Before the Commission May Find That the Public Interest, Convenience and Necessity Would Be Served

The Commission is obligated under the Communications Act to deny the transaction unless it finds that neither the present nor future public convenience and necessity will be adversely affected by its consummation.[70] Where the Commission finds significant risk of harm to the public interest, it must find that the expected benefits to the public arising from the transaction would clearly outweigh the likely public interest harms, or impose conditions to guard against those harms. The public interest harms and benefits must be measured in terms of "the broad aims of the Communications Act," including the "preference for preserving and enhancing competition in relevant markets," as well as "accelerating private sector deployment of advanced services."[71] If the transaction would result in any decline in the availability and quality of services to consumers, the Commission should take corrective action.[72]

Here, the only purported benefit of the proposed transaction is to increase GCI's access to capital. As demonstrated above, this increase in GCI's pocketbook actually poses a threat to the public interest. There are no countervailing "expected benefits" to weigh against this potential harm. Therefore, the Commission must either deny the pending transaction or impose appropriate conditions. Such conditions must be crafted in view of the goals of the Act and the FCC to enhance competition, accelerate deployment of advanced services by the industry, and

[70] 47 U.S.C. §214(a).
[71] *Charter Comm's, supra,* note 6, 31 FCC Rcd at 6337.
[72] *See id*.

increase the availability of services to the public. Alaska Communications proposes three such conditions that are both necessary to ensuring the transaction furthers these goals, and appropriate to terms proposed by the applicants.

Improved Access to Affordable Middle-Mile Infrastructure

The first two conditions proposed by Alaska Communications are related. The FCC first should require that, for all federal support disbursed directly or indirectly to GCIL in the next five years, GCIL must use that support at least in part to expand the middle-mile infrastructure to link Bush communities to existing networks. The Commission should expressly condition approval of these applications on using Universal Service disbursements at least in part towards the deployment of new middle-mile facilities *where they are not available today,* or where capacity today is inadequate to meet current and projected demand, to support fixed and mobile broadband services at speed, capacity, latency, and price meeting the Commission's minimum requirements.

To accomplish this, GCIL should be required to identify in advance the unserved and under-served routes on which it proposes to deploy terrestrial broadband, as part of any build-out under the high-cost, RHC or E-rate program, and the Commission should provide an opportunity for other interested parties to comment on the current and projected needs on such routes, before authorizing USAC to disburse any funds. This condition is consistent with the Commission's intention to target support where it is most urgently needed, to facilitate the universal availability of modern networks to all residences, businesses and community anchor institutions, including RHC facilities, schools and libraries.[73]

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[73] *See, e.g., Connect America Fund,* Report and Order, 29 FCC Rcd 15644, ¶¶46-48 (2014) (finding that tailored service obligations for non-contiguous U.S. carriers will further this goal); *Transformation Order* ¶5 ("The universal service challenge of our time is to ensure that all

The Commission already has set in motion a scheme to identify the types of middle-mile facilities employed in the networks of rural Alaska carriers, requiring the carriers subject to the "Alaska Plan" to provide and update maps showing all middle-mile facilities they have deployed and that are used or will be used to support service in CAF-eligible areas.[74] By requiring GCIL to submit its plans for further investment in middle-mile infrastructure before spending any support disbursed by USAC, the FCC can ensure both that GCIL is fulfilling the goal of investment in middle mile and that GCIL is constructing facilities in unserved or under-served areas, rather than over-building existing facilities.

As explained, one of the Commission's goals is ensuring that limited support dollars are used as efficiently as possible. In the past, high-cost, E-Rate and RHC dollars have not always been deployed to give the maximum "bang" for the USAC buck. This is one scenario in which that trend can be reversed. Requiring that any support GCIL collects from USAC in the next five years be used in part to bridge the middle-mile gap will help remediate GCI's past monopolization of the middle-mile market. Moreover, such investment will be pro-competitive: If additional middle-mile infrastructure is constructed, end-users will see new service offerings from not just one but multiple service providers able to link their fixed or mobile networks to high-speed middle-mile infrastructure beyond the local community.

As a second condition, the Commission should require that all infrastructure deployed by GCIL or any of its predecessors relying in whole or in part on federal high-cost support, RHC support, E-rate support, or any other federal subsidies, be subject to the basic common carrier requirements of Sections 201, 202 and 208, including making access available upon reasonable

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Americans are served by networks that support high-speed Internet access – in addition to basic voice service – where they live, work, and travel").

[74] *Alaska Plan Order, supra,* note 29, 31 FCC Rcd at 10158, ¶60.

and non-discriminatory terms. This requirement should apply to existing facilities such as the monopoly Terra network, as well as facilities and services that GCIL offers going forward, for which GCI already obtained federal funding, or for which GCIL applies for any type of federal subsidy in the future. In particular, Alaska Communications recommends that the FCC adopt a rebuttable presumption that transport rates on subsidized facilities should be no greater than 20 times the Alaska urban rate (*i.e.,* the Anchorage rate) for comparable offerings, and allow GCIL to charge higher rates only if it can prove such rates are justified based on forward-looking costs. If GCIL fails offer subsidized middle-mile infrastructure to the public on affordable and reasonably non-discriminatory terms, the Commission should instruct USAC to suspend payment, and GCIL should be subject to penalties, including repayment of subsidies received.

The Commission also should require that GCI's wholesale rates on subsidized middle mile facilities be subject to an imputation test, ensuring that the wholesale rates GCI charges other competitors serving a particular community be imputed to the retail rates GCI provides to its own end-user customers in that same community, so that appropriate enforcement action may be taken if GCI is charging below-cost retail rates in violation of federal law.[75]

Under these terms, the Commission can ensure that allowing GCI to become an even larger company, and continuing to subsidize that company, can be achieved in a manner that furthers the FCC goals of accelerating private sector deployment of advanced services, promoting competition, and expanding the services available to the public, while lowering the cost of communications to the Bush. As an added benefit, federal programs such as RHC and E-Rate would experience cost savings over time.

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[75] Below-cost pricing is not always unlawful; but *in a non-competitive environment* it is inherently suspect. An imputation requirement will help with detection and enforcement in the case where GCI is suspected of anti-competitive behavior.

Service Restoration on Commercially Reasonable Terms

The third and final condition proposed by Alaska Communications is also inspired by GCI's past abuses of its market position. When carriers experience service interruptions due to acts of God and other forces beyond their control, such as cable cuts, they customarily call upon another carrier to resell the latter's service on the same route to restore service as quickly as possible. They typically maintain mutual service restoration agreements in anticipation of such events.

These occurrences are not infrequent in Alaska. In 2014, for example, due to an earthquake and resulting sub-sea landslide, an Alaska Communications undersea fiber-optic cable linking Anchorage and Juneau was cut and service in southeast Alaska was interrupted. The damage was substantial and required emergency deployment of a cable repair ship from British Columbia, and ultimately the replacement of more than nine kilometers of undersea fiber optic cable. Given the scope of the work to be done, it is remarkable that repair was completed in 20 days.[76]

Alaska Communications was able to restore essential services to the state capital and the affected region within 24 hours thanks to a service restoration agreement it negotiated with another carrier (not GCI) that had surplus capacity under a lease of capacity on GCI's cable.[77] Alaska Communications tried unsuccessfully to negotiate reasonable terms directly with GCI, which operates the only other cable on the same route. GCI refused to give Alaska Communications terms that were commercially reasonable, but instead tried to gouge Alaska

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[76] Declaration of Mike Todd, attached hereto as Exhibit D, ¶5.
[77] Todd Declaration ¶6.

Communications. GCI attempted to use its unique position, and the misfortune of a competitor, to its financial advantage, without regard to the threat to public safety and welfare. In fact, the price at which GCI was willing to make capacity available was roughly four times more expensive than what was charged by the other carrier.[78]

GCIL will be even larger than GCI, and will be in an even better position to refuse basic accommodation to other carriers, such as emergency service restoration, if the merger is allowed to be consummated. GCIL will be affiliated with a company that has even greater reach with its undersea cable network, and even greater ability to raise a rival's costs. The Commission therefore should require GCIL, as a condition of closing, to enter into service restoration agreements on reasonable commercial terms with other Alaska carriers upon request.

[78] *Id.*

CONCLUSION

As proposed, this merger poses substantial harm to the public interest. GCI already operates as an unregulated monopoly on many routes. If this transaction is not properly conditioned, it threatens to further burden consumers, competition, and the public interest. In contrast, with a few well-targeted conditions, the Commission could further its goals of promoting competition and private investment in advanced services and infrastructure in unserved and under-served areas. For the reasons described herein, the Commission should approve this transaction only if it adopts conditions that are necessary and appropriate to prevent GCIL from abusing its market position. In the absence of such conditions, the applications should be denied.

Respectfully submitted,

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June 19, 2017

Counsel for Alaska Communications

Certificate of Service

Pursuant to Section 1.47 of the Commission's rules, 47 C.F.R. §1.47, I hereby certify that the foregoing "Petition To Deny" of Alaska Communications Systems today was served upon the following by first-class mailing, postage prepaid, with the U.S. Postal Service:

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